LIBRARY
SUPREME COURT, U. S.

NO. 73-706

FILED
NOV 28 1973
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

IN THE MATTER OF THE INCORPORATION OF FOREST HILL, A MUNICIPAL CORPORATION, WALLACE FIELDS, ET AL
(Edward Martin Peusch, Petitioner)

Vs.

CITY OF JACKSON, MISSISSIPPI .....Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

L. ARNOLD PYLE,
Attorney at Law
1347 Deposit Guaranty National Bank Bldg.
P. O. Box 427
Jackson, Mississippi 39205

JOHN E. STONE,
Attorney at Law
City Hall
P. O. Box 17
Jackson, Mississippi

Attorneys for Respondent

WATKINS, PYLE, LUDLAM, WINTER and STENNIS
1347 Deposit Guaranty National Bank Building
P. O. Box 427
Jackson, Mississippi 39205

Of Counsel for Respondent

INDEX

Subject Index — Page

Statement of the Case 1, 2, 3

Jurisdiction

I Petitioner's Brief Fails to State a Substantial Federal Question 3-9

A. The Petitioner's allegation, that the trial court wrongfully consolidated the Incorporation proceedings with the Annexation proceedings for the trial, is not a substantial federal question; it is merely a routine state procedural question 3, 4, 5, 6

B. The Petitioner's allegation that the Mississippi Statutes for enlarging municipal boundaries are unconstitutional is not properly before the Court because it was not raised at any time in the court below, but, even if it had been raised, it would not present a substantial federal question 6 7, 8, 9

II. There is No Special and Important Reason for Review of the Mississippi Supreme Court's Decision 10

Conclusion 11

Certificate 12

Cases Cited

Benz v. New York Thruway Authority, 369 U.S. 147, 7 L.Ed. 2d 634 (1962) 6

Page

Bridges v. City of Biloxi, 253 Miss. 812, 170 So. 2d 683; motion for stay overruled 253 Miss. 812, 180 So. 2d 154; motion to fix amount of supersedeas bond and to stay judgment and mandate overruled, 253 Miss. 812, 180 So. 2d 641 (1965); motion to dismiss granted 383 U.S. 574, 16 L.Ed. 2d 106 (1966) 9

Fields v. City of Jackson, 280 So. 2d 837 (Miss. 1973) 3, 4

Hammonds v. City of Corpus Christi, 343 F. 2d 162 (5th Cir. 1965), cert denied, 382 U.S. 837, 15 L.Ed. 2d 80 9

Honneyman v. Hanan, 302 U.S. 375, 82 L.Ed. 2d 312 (1939) 5

Hunter v. City of Pittsburg, 207 U.S. 161, 52 L.Ed. 151 (1907) 7

International Harvester Company v. Kansas City, 380 F. 2d 35 (10th Cir. 1963), cert denied 371 U.S. 948, 9 L.Ed. 2d 498 9

Lobber v. Schroeder, 149 U.S. 580, 37 L.Ed. 856 (1893) 5

Ritchie v. City of Brookhaven, 217 Miss. 860, 65 So. 2d 436 (1953) 9

United States Statutes Cited

28 U.S.C.A. § 1257 (3) 3

State Statutes Cited

Miss. Code Ann. (1942) 3374-03 (now Miss. Code Ann. (1972) § 21-1-13) 6

Page

Miss. Code Ann. (1942) § 3374-10 (now Miss. Code Ann. (1972) § 21-1-31) 6

Miss. Code Ann. (1972) §§ 21-1-31 through 21-1-37 (Formerly Miss. Code Ann. (1942) §§ 3374-12 through 3374-14 11

Supreme Court Rules Cited

Rule 19.1 11

Rule 19.1 (a) 5

Rule 23.1 (f) 7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-706

IN THE MATTER OF THE INCORPORATION OF FOREST HILL, A MUNICIPAL CORPORATION, WALLACE FIELDS, ET AL
(Edward Martin Peusch, Petitioner)

Vs.

CITY OF JACKSON, MISSISSIPPI ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

The decision of the Mississippi State Supreme Court, which the petitioners request this Court to review, is one involving a routine municipal incorporation case. At a time when the City of Jackson, Mississippi had under study and had made a public announcement to the effect that it was going to adopt an ordinance pursuant to the statutes of the State of Mississippi to annex certain territory immediately adjacent to the city limits, the petitioner, and others, circulated a petition for the incorporation, into a new city, of a portion of the territory which

the City of Jackson had announced it would undertake to annex. The Petition for Incorporation was filed in the state court one week prior to the date the City of Jackson was able to file its Petition for the approval and ratification of its ordinance annexing the same territory to the City of Jackson. The City of Jackson immediately filed its protest to the Incorporation Petition on the grounds that the petition did not have the signatures of at least two-thirds of the qualified electors residing in the area sought to be incorporated, as required by statute; and, on the further ground, that it was not economically feasible to incorporate the area into a new city, since it was almost exclusively a bedroom community with limited assessed valuation of property which was insufficient to produce the necessary revenues to furnish municipal services to the people residing in the area. Therefore, the City of Jackson alleged, and subsequently proved, that the Petition for Incorporation was unreasonable within the meaning of the statutes of the State of Mississippi and the decisions of the Supreme Court of the State of Mississippi.

The City of Jackson in its Petition for Annexation of the territory in question alleged that it was in a much better position to economically furnish municipal services and other benefits to the residents of the area.

The trial court, as a discretionary matter, consolidated the two cases for trial, and after a lengthy hearing rendered its opinion with extended findings of fact and conclusions of law stating that both petitions should be denied. The petitioner, and others, residing in the area in question, perfected an appeal from the decree of the trial court, denying the Petition for Incorporation, to the Supreme Court of Mississippi. The Supreme Court of Mississippi affirmed the trial court's decision on June

25, 1973 and denied rehearing on August 10, 1973. *Fields v. City of Jackson,* 280 So. 2d 837 (Miss. 1973). The petitioner, one of the residents of the Forest Hill area, after having lost three times in state court now brings this petition to the United States Supreme Court for a writ of certiorari to the Supreme Court of Mississippi.

JURISDICTION

I

PETITIONER'S BRIEF FAILS TO STATE A SUBSTANTIAL FEDERAL QUESTION.

The petitioner's position can be summarized into the following: That he has been denied due process of Law by the Mississippi Supreme Court decision sub judice in two respects, one, the trial court wrongfully consolidated, for the purposes of trial, the Forest Hill Incorporation petition with the City of Jackson's Annexation petition; and, two, the State of Mississippi's statutes for enlarging municipal boundaries are unconstitutional.

While the petitioner alleges that he has been denied due process rights guaranteed by the Fourteenth Amendment to the United States Constitution in order to meet the requirements of 28 U.S.C.A. § 1257 (3), he fails to state a substantial federal question as required by Rule 19.1 (a) of the Rules of the Supreme Court of the United States.

A. The Petitioner's allegation, that the trial court wrongfully consolidated the Incorporation proceedings with the Annexation proceedings for the trial, is not a substantial federal question; it is merely a routine state procedural question.

The Mississippi Supreme Court carefully considered this point and determined after a complete review of

the entire record that the chancellor did not commit prejudicial error in consolidating the two proceedings for trial. *Fields v. City of Jackson*, 287 So. 2d 837 (Miss. 1973) (Appendix A1 through A5 of petitioner's brief). The specific language of the Mississippi Supreme Court in regard to this point is found at 280 So. 2d at 838-839 as follows:

> [1] We conclude that the petition of the citizens of the community of Forest Hill to incorporate having been first filed should have been heard on the reasonableness of the incorporation uncluttered by the annexation proceeding. The greater question, however, is whether the consolidation of the two causes constituted an error of such proportion that the cause should be reversed. Under the statutes appertaining to either incorporation or annexation the issue basic to each is whether it is reasonable and required by public convenience and necessity. Though in our opinion the petitions were improperly consolidated, nevertheless the trial court's opinion conclusively indicates that it was formulated from the evidence before it with the statutory issues clearly in mind. *We therefore are of the opinion the consolidation, under the circumstances before us, was not prejudicial error.* [Emphasis added]

The trial court's determination that the cases should be consolidated for trial was a decision regarding state practices and procedure. The Mississippi Supreme Court reviewed the record in its entirety and determined that, while the trial court erred in consolidating the two causes, there was no prejudicial effect because the basic issue of each proceeding was the same; and, the trial court's opinion indicated that its decision was made "from the evidence before it with the statutory issues

clearly in mind." The United States Supreme Court ruled in 1893 that questions involving state practice and procedure were not substantial federal questions. *Lobber v. Schroeder,* 149 U.S. 580, 37 L. Ed 856 (1893). In this case the petitioner appealed to the court on the grounds that he had been denied due process of law because evidence had been admitted at the trial which constituted a variance, and that the suit was a suit at law which had been tried in an equity court. In regard to these two points, the United States Supreme Court made the following statement at 149 U.S. 585; 37 L. Ed 859, 860:

> If any Federal question existed in the case the attempt to raise it came too late, but we are of the opinion that no Federal question really exists in the case. The provisions of the statute complained of by the plaintiff in error are manifestly not in conflict with any provision of the Constitution of the United States, or of any law of Congress passed in pursuance thereof. The said statute relates to a matter of state practice alone, and proper construction of that statute, upon well settled principles, rested with the state courts. The questions as to whether the plaintiff's remedy was in law or in equity was a matter dependent entirely upon local law, and involved no Federal right whatever.
>
> We are, therefore, of opinion that the motion to dismiss for want of jurisdiction should be sustained, and it is accordingly so ordered.

More recent decisions of this Court have followed the same rule of law that matters of local practice and procedure do not constitute substantial federal questions. In *Honneyman v. Hanan,* 302 U.S. 375, 82 L. Ed 312

(1939), the petitioner had failed to assert his claim for a deficiency judgment in a foreclosure action at the proper time and his separate suit, filed later, was dismissed because of his failure to follow local practice and procedure. The Supreme Court ruled that the state court's decision dismissing the petitioner's claim, did not constitute a substantial federal question. In *Benz v. New York Thruway Authority*, 369 U.S. 147, 7 L.Ed 2d 634 (1962), the Court ruled that no substantial federal question was presented by a petition for writ of certiorari which requested review of the judgment of the New York Court of Appeals. This Court had ruled, under the rules of state practice, that an eminent domain suit could not be maintained in the New York State Supreme Court because jurisdiction over eminent domain litigation was vested exclusively in the New York Court of Claims.

B. The Petitioner's allegation that the Mississippi Statutes for enlarging municipal boundaries are unconstitutional is not properly before the Court because it was not raised at any time in any court below, but, even if it had been raised, it would not present a substantial federal question.

The petitioner on page 6 of his brief states that the Mississippi Supreme Court "had to construe Sections 3374-03 and 3374-10 of the Mississippi Code Annotated 1942, and therefore *sub silentio* determined the Statutes to be constitutional." This statement, though obviously it is not intended, is an admission that the petitioner failed to make any objection to the constitutionality of these statutes in the courts below. This point of course cannot be raised for the first time in the United States Supreme Court. The petitioner's failure to specifically

state, in his statement of the case, the specific stage in the trial court and in the appellate court in which he objected to the constitutionality of the aforementioned statutes, bars his raising this point at this time. Rule 23.1 (f) of the Rules of the Supreme Court of the United States. Obviously the petitioner could not specify when this point was raised in the courts below, because it was not raised.

Even if the point had been raised below, it would not constitute a substantial federal question. The statutes attacked are discussed on pages 10-19 of the petitioner's brief as being in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The thrust of the argument is that these statutes are unconstitutional because the affected citizens are not given the right to determine by popular referendum whether their territory will be annexed. Many years ago in *Hunter v. City of Pittsburg*, 207 U.S. 161, 52 L.Ed 151 (1907), the United States Supreme Court ruled against the petitioner's argument. In that case the Court was concerned with a Pennsylvania Act authorizing the consolidation of two cities upon a majority vote of the electors in the combined cities. A majority of the total votes cast in the two cities of Allegeheny and Pittsburg were in favor of a consolidation, but a majority of the votes cast in the smaller city of Allegeheny opposed it. The citizens of Allegeheny objected contending that the Pennsylvania Act unconstitutionally deprived them of their property without due process of law. The Supreme Court rejected these objections affirmed the state court stating at 207 U.S. 178, 179; 52 L.Ed 1559:

> . . . . We think the following principles have been established by them and have become settled doctrines

of this court, to be acted upon wherever they are applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destory the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered

> or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

The United States Supreme Court has not reconsidered this point since that time even though cases raising the same general point have been considered by this Court and review denied. *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), *cert. denied*, 382 U.S. 837, 15 L.Ed 2d 80; *International Harvester Company v. Kansas City*, 308 F.2d 35 (10th Cir. 1963), *cert. denied* 371 U.S. 948, 9 L.Ed 2d 498.

The constitutionality of these same statutes has been considered and upheld by the Mississippi Supreme Court in *Ritchie v. City of Brookhaven*, 217 Miss. 860, 65 So. 2d 436 (1953). In 1966 certain objectors to an annexation proceeding by the City of Biloxi, Mississippi, after failing in the state trial court and the Supreme Court of the State of Mississippi, undertook an appeal from the final judgment of the Supreme Court of the State of Mississippi to the United States Supreme Court. The Supreme Court, on motion of the City of Biloxi, respondent, dismissed the appeal for want of a substantial federal question. *Bridges v. City of Biloxi*, 253 Miss. 812, 178 So. 2d 683; motion for stay overruled 253 Miss. 812, 180 So. 2d 154; motion to fix amount of supersedeas bond and to stay judgment and mandate overruled, 253 Miss. 812, 180 So. 2d 641 (1965); motion to dismiss granted 383 U.S. 574, 16 L.Ed 2d 106 (1966).

II

THERE IS NO SPECIAL AND IMPORTANT REASON FOR REVIEW OF THE MISSISSIPPI SUPREME COURT'S DECISION.

Rule 19.1 of the Rules of the Supreme Court of the United States specifically states that a review on writ of certiorari "is not a matter of right but of sound judicial discretion and will be granted only where there is special and important reasons therefor." The Mississippi Supreme Court has thoroughly reviewed the record in this case and has determined that the trial court's decision dismissing the petitioner's incorporation proceeding should be affirmed. The only alleged error, which was raised in the courts below and which has been presented to this Court, is one which involves state procedure and practice and does not raise a substantial federal question. The Mississippi municipal annexation statutes allow anyone who is adversely affected by either proceeding the right to file a protest with the Chancery Court of proper jurisdiction and fully state his grievances before the Court. If he should lose there, he can appeal with supersedeas to the Mississippi State Supreme Court by posting a bond in the amount of $500. Miss. Code Ann. §§ 21-1-31 through 21-1-37 (1972); formerly, Miss. Code Ann. §§ 3374-12 through 3374-14 (Supp. 1972).

CONCLUSION

Wherefore, for the foregoing reasons the respondent most respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN E. STONE

And

L. ARNOLD PYLE

Attorneys for Respondent

By L. Arnold Pyle
L. ARNOLD PYLE

JOHN E. STONE, City Attorney
City Hall
Jackson, Mississippi 39201

WATKINS, PYLE, LUDLAM,
WINTER and STENNIS
1347 Deposit Guaranty National Bank
Bldg.
P. O. Box 427
Jackson, Mississippi 39205

CERTIFICATE

I, L. Arnold Pyle, one of the Attorneys for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27 day of November, 1973, I served five printed copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi on Honorable John Arthur Eaves, Eaves & Eaves, Bankers Trust Plaza Building, Jackson, Mississippi 39205, Attorney for Edward Martin Peusch, Petitioner, by United States mail, in a duly addressed envelope, postage prepaid.

L. Arnold Pyle

L. ARNOLD PYLE
Attorney for The City of Jackson,
Mississippi, Respondent